

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRANDSAFWAY SERVICES, LLC,

Case No. 3:20-cv-00362-MMD-CLB

Plaintiff,

v.

ORDER

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 169,

Defendant.

I. SUMMARY

Plaintiff BrandSafway Services, LLC seeks in part declaratory relief that it is not a party to a collective bargaining agreement with Defendant Laborers International Union of North America, Local 169, and that the Court determines whether this threshold issue should be decided by an arbitrator. (ECF No. 1.) Before the Court is Plaintiff's motion for preliminary injunction ("Injunction Motion") (ECF No. 2) to preliminary enjoin the arbitration, as well as Defendant's competing motion to compel arbitration ("Motion to Compel") (ECF No. 7), and motion to stay this case pending the Court's resolution of the Motion to Compel ("Motion to Stay") (ECF No. 8). As explained further below, the Court will deny Defendant's Motion to Compel because the question of whether a valid agreement exists between the parties is reserved for the Court's determination. Accordingly, Defendant's Motion to Stay will be denied as moot. Further, the Court will also deny Plaintiff's Injunction Motion because Plaintiff has failed to demonstrate either a likelihood of success on the merits or irreparable harm.

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1 **II. BACKGROUND**

2 On July 16, 2018, Defendant renewed a prior collective bargaining agreement with
 3 the Nevada Chapter of the Association of General Contractors (“Nevada AGC”), an
 4 association comprising several member companies in several states, including Nevada.
 5 (ECF No. 7-6 at 6.) Before signing the Agreement, Defendant sent written notice to
 6 “Safway Services, LLC” (“Safway”), a member company of Nevada AGC and signatory
 7 to the predecessor 2015-2018 collective bargaining agreement. (ECF No. 7-3 at 49.) That
 8 notice, dated May 11, 2018, stated that Safway would be bound by the terms of the new
 9 Agreement unless it rendered timely written notice per Section 39 of the 2015-2018
 10 collective bargaining agreement. (*Id.*)

11 Defendant asserts that in May 2017, the company “Safway Group” merged with
 12 the company “Brand Energy Infrastructure Services” to form Plaintiff “BrandSafway
 13 Services, LLC.” (ECF No. 7 at 2.) But neither party has clarified the relationship between
 14 Safway Group and Safway. Plaintiff confirmed that the entity that performs work in Reno,
 15 “BrandSafway Services, LLC,” was formerly known as “Safway Services LLC,” but denied
 16 that there was any legal contractual relationship between “BrandSafway” and “Local 169.”
 17 (ECF No. 7-3 at 2.)

18 Defendant then sent Plaintiff a grievance letter on August 1, 2019 (“First
 19 Grievance”), alleging Plaintiff failed to comply with the terms of the collective bargaining
 20 agreement—Laborers’ Master Agreement (“Agreement” or “LMA”)—by hiring workers in
 21 violation of their exclusive contract. (ECF No. 15-4.) Plaintiff responded, denying that it
 22 was party to any agreement with Defendant. (ECF No. 15-5.)

23 On October 2, 2019, Defendant sent Plaintiff a second grievance letter (“Second
 24 Grievance”) seeking recognition of Plaintiff’s obligation to comply with the Agreement.
 25 (ECF. No. 15-6.) Plaintiff again responded that it would not submit to the grievance and
 26 arbitration process because it was not a party to the Agreement. (ECF No. 15-7.)

27 Plaintiff next filed an Unfair Labor Practice charge with the National Labor
 28 Relations Board (“NLRB”) on November 12, 2019 regarding Plaintiff’s right to contract

1 with workers who were not members of Defendant Local 169. (ECF No. 15-10.) At the
 2 NLRB hearing, which took place on February 18, 2020, Defendant stated that the First
 3 Grievance was no longer pending against Defendant or any employer. (ECF No. 15-13
 4 at 18.) The only remaining question was therefore “whether or not there is an agreement
 5 between BrandSafway and the Laborers.” (*Id.* at 19.) The NLRB failed to find any
 6 evidence that Plaintiff and Defendant had a valid agreement.¹ (ECF No. 15-16 at 5.)

7 All the while, Defendant continued to seek arbitration of the Second Grievance.
 8 (ECF Nos. 15-12, 15-14, 15-15.) Despite their disagreement about the authority of an
 9 arbitrator to enforce the Agreement against Plaintiff, the parties subsequently moved
 10 forward and scheduled an arbitration on the Second Grievance. (ECF No. 15-12.) On
 11 November 22, 2019, Plaintiff agreed via email to “participate” in the arbitration:

12 subject to the following objections: (1) the Company is not party to an
 13 agreement with Laborers Local 169 and, therefore, the Company is not
 14 legally bound to resolve this dispute in accordance with the terms of any
 15 such agreement, nor can the Company be compelled to submit any dispute
 16 to arbitration; (2) the arbitrator lacks jurisdiction and authority to decide the
 issues of whether there exists an agreement to arbitrate and whether the
 Company is legally bound to arbitrate; and (3) the Company expressly
 reserves its right to have that issue determined by a court of competent
 jurisdiction.

17 (*Id.*) Three months later, Plaintiff informed Defendant and the arbitrator that it “does not
 18 consent to arbitration . . . will not appear for a hearing . . . and will not agree to submit any
 19 issue to an Arbitrator for resolution.” (ECF No. 15-14.) Plaintiff reiterated its position that
 20 “whether a contract between Parties exists . . . is an issue that may only be determined
 21 by a federal court of law, and is not subject to arbitration.” (*Id.*) This lawsuit followed.

22 **III. DISCUSSION**

23 Defendant moves to compel arbitration to determine whether a binding labor
 24 agreement exists between the parties. (ECF No. 7 at 1.) Conversely, Plaintiff moves to
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27 ¹The NLRB found “no evidence that Local 169 has a collective bargaining
 28 agreement with the Employer covering the work in dispute. Although Local 169 asserts
 that the Employer is bound to the [Laborers’ Master Agreement (“LMA”)] as a successor
 to Safway Services, LLC, Local 169 has failed to establish that Safway Services was itself
 bound to the LMA.” (ECF No. 15-16 at 5.)

1 enjoin arbitration pending the Court's determination of that same issue. (ECF No. 2 at 8-
 2 9.)

3 Defendant contends first that Plaintiff is bound by the Agreement because Plaintiff
 4 failed to timely terminate the Agreement per the terms of the 2015-2018 collective
 5 bargaining agreement. (ECF No. 7 at 15-16.) Defendant further asserts that Plaintiff
 6 consented to the arbitrator's authority when it agreed to participate in the arbitration. (*Id.*
 7 at 10; see also ECF No. 7-5 at 27.) Plaintiff maintains that it is not a party to the Agreement
 8 and objects to the arbitrator's jurisdiction to decide whether an agreement to arbitrate
 9 exists. (ECF No. 15 at 12-13; ECF No. 15-12 at 2.) The parties thus genuinely dispute
 10 whether Plaintiff is a party to the Agreement.²

11 That said, the threshold question now before the Court is not whether Plaintiff is
 12 bound by the Agreement, but who may determine whether Plaintiff is bound by the
 13 Agreement. Because the question of arbitrability is a legal question committed to the
 14 jurisdiction of the federal courts, the Court will deny both Defendant's Motion to Compel
 15 and Motion to Stay. However, Plaintiff has failed to provide sufficient evidence to
 16 demonstrate its entitlement to the extraordinary remedy of a preliminary injunction.
 17 Because the Court is unable to determine that Plaintiff is likely succeed on the merits of
 18 its declaratory relief claim or suffer irreparable injury, the Court will also deny the
 19 Injunction Motion. The Court first addresses Defendant's motions in more detail, below,
 20 and then Plaintiff's Injunction Motion.

21 **A. Motion to Compel and Motion to Stay**

22 Federal courts, and not arbitrators, determine the existence of a labor contract for
 23 purposes of an agreement to arbitrate. See *Granite Rock Co. v. Int'l Bhd. of Teamsters*,
 24 561 U.S. 287, 296 (2010); accord *SEIU Local 121RN v. Los Robles Med. Ctr.*, 976 F.3d

25 2In a letter dated October 8, 2019, determining which issues were in dispute,
 26 Defendant clarified, "[t]here is an unresolved dispute between the Union and Brandsafway
 27 Services formerly Safway Services as to whether Brandsafway Services formerly Safway
 28 Services is bound to the current LMA." (ECF No. 15-8 at 2.) Responding on October 15,
 29 2019, Plaintiff stated, "[w]hether or not BrandSafway Services is bound to the current
 30 Master Agreement is also not at issue within the jurisdiction of the Board of Adjustment,
 31 or an arbitrator. It is a legal question to be decided by federal court." (ECF No. 15-9 at 2.)

1 849, 861 (9th Cir. 2020). “Unless the parties clearly and unmistakably provide otherwise,
 2 the question of whether the parties agreed to arbitrate is to be decided by the court, not
 3 the arbitrator.” *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986).
 4 The arbitrability of a grievance is a “threshold question . . . for judicial resolution.”
 5 *Westinghouse Hanford Co. v. Hanford Atomic Metal Trades Council*, 940 F.2d 513, 516
 6 (9th Cir. 1991). “Whether or not a company is bound to arbitrate, as well as what issues
 7 it may arbitrate, is a matter to be determined by the court, and a party cannot be forced
 8 to ‘arbitrate the arbitrability question.’” *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208
 9 (1991) (quoting *AT&T Techs., Inc.*, 475 U.S. at 651).

10 The Court therefore agrees with Plaintiff that it, not the arbitrator, must decide
 11 whether Plaintiff agreed to arbitrate. (ECF No. 2 at 9-11 (making the argument).) Indeed,
 12 the Ninth Circuit reaffirmed earlier this year that the question of whether parties had
 13 formed a valid agreement to arbitrate a labor dispute is a question for federal district
 14 courts, not an arbitrator. See *SEIU Local 121RN*, 976 F.3d at 861 (“Without ‘clear and
 15 unmistakable evidence,’ then, we rely on the well-settled principle ‘that whether parties
 16 have agreed to submit a particular dispute to arbitration is typically an issue for judicial
 17 determination.’”) (quoting *Granite Rock, Co.*, 561 U.S. at 296); *see also Int’l Bhd. of*
 18 *Teamsters v. NASA Servs., Inc.*, 957 F.3d at 1041-42 (9th Cir. 2020) (“[T]he federal policy
 19 favoring arbitration of labor disputes plays a role only after a court has been satisfied that
 20 an arbitration agreement was validly formed.”) (internal quotations omitted).

21 Moreover, in light of Plaintiff’s repeated objections to the existence of an
 22 agreement, Defendant lacks the ‘clear and unmistakable evidence’ of an agreement to
 23 arbitrate required for the question of the existence of an agreement to be properly before
 24 an arbitrator. See *AT&T Techs., Inc.*, 475 U.S. at 649. Plaintiff’s first communication with
 25 Defendant, the June 1, 2018 Letter, included its disavowal of any agreement between the
 26 parties. (ECF Nos. 15, 15-3.) And at every relevant point since the filing of Defendant’s
 27 First Grievance, Plaintiff has asserted it is not subject to the Agreement, and does not
 28 consent to the arbitrator’s authority to enforce the Agreement against it. (ECF Nos. 15,

1 15-5, 15-7, 15-9, 15-12, 15-14, 15-15.) Most persuasively, Plaintiff restated it did not
2 believe it was a party to the Agreement—and asserted that it reserved its objection to the
3 arbitrator's jurisdiction—within the same email in which it agreed to participate in the
4 scheduled arbitration. (ECF Nos. 15, 15-12.) No agreement to arbitrate therefore appears
5 to exist.

6 Further, the Court cannot, and does not, resolve today Defendant's claim that
7 Plaintiff automatically became a signatory to the Agreement when it failed to timely object.
8 Defendant alleges that Plaintiff is the successor to signatory Safway and that the
9 Agreement may be enforced against Plaintiff under the evergreen renewal clause of the
10 2015-2018 agreement. (See ECF No. 7 at 17-18.) This may be the case. However, neither
11 party has submitted evidence of Plaintiff's affiliation or lack thereof with Nevada AGC, nor
12 is there yet conclusive evidence that Plaintiff is subject to liability as the successor of the
13 now-defunct Safway. The Court must accordingly defer this question for resolution on the
14 merits.

15 Finally, Defendant claims that Plaintiff consented to arbitrate the question. (ECF
16 No. 7 at 1, 11 (proposing that that agreement to participate in the arbitration rebutted
17 Plaintiff's claim that it repeatedly refused to arbitrate), 19-20 (stating the same).) But
18 Plaintiff objected to the arbitrator's authority to determine whether a valid agreement
19 existed between the parties in every communication it sent to Defendant, including in its
20 email agreeing to "participate." (ECF Nos. 15-3 at 2, 15-5 at 2, 15-7 at 2, 15-9 at 2, 15-12
21 at 2, 15-14 at 2, 15-15 at 2-3, 4-5.) Agreeing to participate while maintaining an objection
22 to the arbitrator's jurisdiction to decide the dispute, then subsequently declining to
23 participate altogether before the arbitration occurs does not show such indisputable
24 consent. Accordingly, the Motion to Compel is denied.

25 In addition, Defendant's Motion to Stay requests that this litigation be stayed
26 "pending the result of Defendant's Motion To Compel Arbitration." (ECF No. 8 at 1.)
27 Because the Court will deny the Motion to Compel here, the Court will also deny the
28 Motion to Stay as moot.

B. Injunction Motion

Plaintiff requests the Court enjoin Defendant “from pursuing its arbitration claim pending a judicial determination by this Court regarding the existence of a binding agreement or other contractual relationship between the parties.” (ECF No. 2 at 1.) Defendant did not oppose Plaintiff’s Injunction Motion directly, but instead responded with the Motion to Compel and Motion to Stay.

“An injunction is a matter of equitable discretion’ and is ‘an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”

Earth Island Inst. v. Carlton, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 32 (2008)). To qualify for a preliminary injunction,

a plaintiff must demonstrate: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) that the balance of hardships favors the plaintiff; and (4) that the injunction is in the public interest. *Winter*, 555 U.S. at 20. The Ninth Circuit also allows the “sliding scale” approach, which permits courts to issue injunctions when there are serious questions going to the merits and the balance of hardships tips sharply in the plaintiff’s favor. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Although *Winter* did not directly address the continued validity of the sliding scale approach, the Supreme Court “definitely refuted” permitting injunctive relief in circumstances where the moving party showed only a possibility instead of a likelihood of irreparable injury. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126-27 (9th Cir. 2009). Therefore, the Court may apply the sliding scale approach only in circumstances where the moving party has shown a likelihood of irreparable injury and that the injunction is in the public interest. See *All. for the Wild Rockies*, 632 F.3d at 1135.

The Court concludes that Plaintiff has not satisfied the first two *Winter* factors and will therefore deny the Injunction Motion.

1. Likelihood of Success on the Merits

Plaintiff has failed to demonstrate that it is likely to succeed on its claim for declaratory relief. In its Injunction Motion, Plaintiff frames the merits question as twofold:

1 (1) that the collective bargaining agreement is not enforceable against Plaintiff because
 2 no contractual or other labor/management relationship exists between the parties; and
 3 (2) that the arbitrator does not have authority to determine whether an enforceable
 4 collective bargaining agreement exists between the parties. (ECF No. 2 at 9.) But while
 5 Plaintiff fully briefed the second question, the first remains unanswered by Plaintiff's
 6 briefing. As explained above, the Court agrees with Plaintiff's analysis that whether an
 7 agreement exists is ultimately a question for federal courts like this one. But while that is
 8 an adequate answer to the Motion to Compel, it is insufficient to support the Injunction
 9 Motion without further evidence that Plaintiff is not a party to the Agreement.

10 Further, while compelling arbitration in this instance would be inappropriate, the
 11 standard for granting a preliminary injunction is not the procedural inverse. When
 12 determining whether Plaintiff is likely to succeed on the merits, the Court must consider
 13 whether Plaintiff is likely to succeed in obtaining declaratory relief “[t]hat the Court enter
 14 an Order that BSS is not a party to the LMA.” (ECF No. 1 at 6.) Plaintiff fails to provide
 15 the Court with enough information to make such a determination at this stage. Plaintiff
 16 also cites *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964), to support its
 17 Injunction Motion. (ECF No. 2 at 11.) But the issue before the Court in *Wiley* was whether
 18 to compel arbitration, not whether to issue a preliminary injunction to enjoin an arbitration.
 19 See *Wiley*, 376 U.S. at 544. In fact, the Supreme Court clearly stated in *Wiley* that even
 20 though it would not compel arbitration, it was still entirely possible that the collective-
 21 bargaining agreement could be enforced against a post-merger company:

22 We hold that the disappearance by merger of a corporate employer which
 23 has entered into a collective bargaining agreement with a union does not
 24 automatically terminate all rights of the employees covered by the
 25 agreement, and that, in appropriate circumstances, present here, the
 26 successor employer may be required to arbitrate with the union under the
 27 agreement.

28 *Id.* at 548. Just as in *Wiley*, the Court may simultaneously deny the Motion to Compel and
 29 reserve a decision on the question of whether Plaintiff is a party to the Agreement.

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1 In addition, while Defendant directly alleges Plaintiff is the successor in interest to
 2 Safway (ECF No. 7 at 16), Plaintiff asserts only that no one has offered proof it should be
 3 bound by Safway's contracts. Plaintiff points out that the NLRB was unable to conclude
 4 that even Safway itself would be bound by the current Agreement (ECF No. 15-16 at 5),
 5 but never denies outright that it is Safway's successor in interest, nor does it show any
 6 evidence to that effect.

7 Neither party has submitted sufficient evidence to show a likelihood of success on
 8 the merits.³ But the burden rests with the Plaintiff. Accordingly, at this time, Plaintiff has
 9 failed to show that it is likely to succeed on the merits of its declaratory relief action.

10 **2. Irreparable Harm**

11 Plaintiff's allegations of irreparable harm do not meet the Ninth Circuit's standard.
 12 Plaintiff submits that courts in various districts have determined that compelling a party to
 13 arbitrate an issue that they have not agreed to submit to arbitrate constitutes de facto
 14 irreparable harm.⁴ (ECF No. 2 at 13.) Some district courts in this Circuit have followed
 15 that reasoning by finding that depriving a party of its right to select the forum to resolve
 16 disputes adequately demonstrates irreparable harm.⁵ But the Ninth Circuit does not

17 ³Both parties' arguments on this point remain conclusory. This question would
 18 have been easier to resolve, for example, had either party submitted a full list of Nevada
 19 AGC affiliates that are signatories to the current Agreement, a declaration clarifying
 20 whether BrandSafway, LLC is or is not the successor in interest to Safway, or other
 evidence that would tend to show whether or not there is a valid and enforceable
 agreement between the parties.

21 ⁴See *Wash. Metro. Area Transit Auth. v. Local 689, Amalgamated Transit Union*,
 22 113 F. Supp. 3d 121, 128 (D.D.C. 2015) (finding WMATA would suffer irreparable harm
 23 if compelled to arbitrate grievances for employees not covered by the collective
 bargaining agreement or for a grievance that is not arbitrable); *Chicago Sch. Reform Bd.*
 24 *of Trustees v. Diversified Pharm. Servs., Inc.*, 40 F. Supp. 2d 987, 996 (N.D. Ill. 1999)
 25 ("Forcing a party to arbitrate a matter that the party never agreed to arbitrate, regardless
 26 of the final result through arbitration or judicial review, unalterably deprives the party of
 27 its right to select the forum in which it wishes to resolve disputes."); *Mount Ararat*
Cemetery v. Cemetery Workers and Greens Attendants Union, Local 365, S.E.I.U.,
A.F.L.-C.I.O., 975 F. Supp. 445, 447 (E.D.N.Y. 1997) (finding company "may be
 presumed to suffer irreparable harm if forced to arbitrate a dispute it did not intend to be
 subject to arbitration after its contract expired").

28 ⁵See *Berthel Fisher & Co. Fin. Servs., Inc. v. Frandino*, Case No. CV-12-02165-
 PHX-NVW, 2013 WL 2036655, at *8 (D. Ariz. May 13, 2015); *Morgan Keegan & Co. v.*

1 agree. See *Camping Const. Co. v. Dist. Council of Iron Workers*, 915 F.2d 1333, 1349
 2 (9th Cir. 1990) (“The district court’s principal error lies in its assumption that unnecessarily
 3 undergoing arbitration proceedings constitutes irreparable injury. That is simply not the
 4 case.”). The Ninth Circuit specifically noted in *Camping Construction* that “any arbitral
 5 award obtained by the party seeking arbitration will have no preclusive effect in a
 6 subsequent confirmation or *vacatur* proceeding as long as the objecting party has
 7 reserved its right to a judicial, rather than arbitral, determination of arbitrability.” *Id.*
 8 Because parties like Plaintiff are left with “a perfectly adequate legal remedy for an
 9 improper award,” the only remaining harm incurred would be “the short time and slight
 10 expense involved in the typical arbitration.” See *id.*

11 The Court recognizes that if Plaintiff was never a signatory to the Agreement,
 12 compelling arbitration of the Second Grievance would require Plaintiff to arbitrate an issue
 13 that is reserved to the jurisdiction of the federal courts, potentially incurring unnecessary
 14 costs or even an adverse arbitral award. But the Court cannot find that additional time
 15 and expense alone would be truly “irreparable.” Moreover, while submitting the question
 16 to the arbitrator may result in duplicative efforts for both parties, doing so does not
 17 preclude Plaintiff from receiving a final judicial determination—in part because, as
 18 described above, Plaintiff did not consent to submitting the arbitration question to the
 19 arbitrator. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“If, on
 20 the other hand, the parties did not agree to submit the arbitrability question itself to
 21 arbitration, then the court should decide that question just as it would decide any other
 22 question that the parties did not submit to arbitration, namely, independently.”); *U.A. Local*
 23 *342 Apprenticeship & Training Trust v. Babcock & Wilcox Const. Co. Inc.*, 396 F.3d 1056,
 24 1058 (9th Cir. 2005) (reasoning that deference is not owed to an arbitrator’s decision
 25 finding against parties who did not consent to the collective bargaining agreement or the
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 28 *McPoland*, 829 F. Supp. 2d 1031, 1036 (W.D. Wash. 2011); *Morgan Keegan & Co., Inc.*
v. Drzayick, Case No. 1:11-CV-00126-EJL, 2011 WL 5403031, at *4 (D. Idaho Nov. 8,
 2011).

1 arbitrator's authority). Accordingly, the Court finds Plaintiff has not demonstrated it is likely
2 to suffer irreparable harm.

3 **IV. CONCLUSION**

4 The Court notes that the parties made several arguments and cited to several
5 cases not discussed above. The Court has reviewed these arguments and cases and
6 determines that they do not warrant discussion as they do not affect the outcome of the
7 motions before the Court.

8 It is therefore ordered that Defendant's Motion to Compel (ECF No. 7) is denied.

9 It is further ordered that Defendant's Motion to Stay (ECF No. 8) is denied as moot.

10 It is further ordered that Plaintiff's Injunction Motion (ECF No. 2) is denied.

11 DATED THIS 19th Day of November 2020.

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15 MIRANDA M. DU
16 CHIEF UNITED STATES DISTRICT JUDGE
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